Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of	)	
	)	
CHAMPION INDUSTRIES, INC.	)	
	)	File No. 50123-CM-P-92
For Authority to Construct and Operate a New Multipoint Distribution Service Station on the F-Group Channels at Springfield, Missouri	)	

ORDER ON RECONSIDERATION

Adopted: June 30, 2003 **Released: July 22, 2003**

By the Commission: Commissioner Copps issuing a separate statement.

I. INTRODUCTION

1. In this *Order on Reconsideration*, we consider a petition for reconsideration (Petition) filed on September 20, 2001, by Champion Industries Inc. (Champion).[1] Champion seeks reconsideration of a *Memorandum Opinion and Order* (*MO&O*)[2] in which the Commission affirmed the action of the Video Services Division (Division) of the former Mass Media Bureau regarding the above-captioned application. The Division dismissed Champion's above-captioned application to construct and operate a Mulitchannel Multipoint Distribution Service (MMDS) station on the F Group channels at Springfield, Missouri.[3] For the reasons stated below, we deny Champion's Petition.

II. BACKGROUND

A. Champion's MMDS License

2. Champion was the original 1983 conditional licensee for a MMDS station in Springfield Missouri using the F Group channels.[4] When Champion failed to complete construction of the station within the time allotted by its conditional license, its representative met with Robert James, Chief,

[1] Champion Petition for Reconsideration, File No. 50123-CM-P-92, (filed Sep. 20, 2001) (Petition).

[2] Champion Industries, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 16040 (2001) (*MO&O*).

[3] Champion Industries, Inc., *Order on Reconsideration*, File No. 50123-CM-P-92, (MMB VSD 1999) (*Video Services Order on Reconsideration*). The Multipoint Distribution Service (MDS) is a domestic public radio service rendered on microwave frequencies from one or more fixed stations transmitting to multiple receiving facilities located at fixed points. MDS also may encompass transmissions from response stations to response station hubs or associated fixed stations. *See* 47 C.F.R. § 21.2. The Multichannel Multipoint Distribution Service (MMDS) employs the frequency band 2596 MHz to 2644 MHz and associated 125 kHz channels. *Id*.

[4] *See* Petition at 2-4. The F Group channels constitute frequencies at 2602-2608 MHz, 2614-2620 MHz, 2626-2632 MHz and 2638-2644 MHz (designated as Channels F1, F2, F3 and F4, respectively, with the four channels designated as the F Group channels); and Channels I6 and I14, as listed in 47 C.F.R. § 74.939(j). *See* 47 C.F.R. § 21.901(b)(5).

Domestic Radio Branch, Domestic Facilities Division, former Common Carrier Bureau, to inquire about an extension of the construction period.[5]

3. Champion claims that Mr. James informed its representative that processing an application for extension of time would be burdensome for the Commission and that the same result could be achieved if Champion submitted its conditional license for cancellation and immediately filed a new application. Champion submitted its conditional license for cancellation on September 26, 1991, and filed the subject new application on October 7, 1991. However, its new application was defective because it did not comply with the Commission's Rules in two major respects: (a) it lacked an engineering showing documenting that Champion's proposed new facility would not cause interference to nearby previously proposed or authorized MMDS stations;[6] and (b) Champion did not serve interference analyses on all affected parties.[7] Accordingly, Champion's new application was dismissed by the Division on March 7, 1995.

B. Petition for Reconsideration of the Division Order

4. On April 28, 1995, Champion filed a petition for reconsideration of the Division's dismissal of Champion's new application.[8] Therein, Champion conceded that it failed to submit interference analyses and did not serve other parties, as required by the Rules. However, it argued that it was not required to conform to the relevant rules because the interference analyses and service on other

[5] *See* Champion Petition at 5. Licensees were granted licenses subject to certain conditions including, but not limited to, construction deadlines. Section 21.43 of the Commission's Rules provides in relevant part that:

> (a) Each license for a radio station for the services included in this Part shall *specify as a condition* therein the period during which construction of facilities will be completed and the station made ready for operation. Construction may not commence until the grant of a license, and must be completed by the date specified in the license as the termination date of the construction period. Except as may be limited by § 21.45(b) or otherwise determined by the Commission for any particular application, the following shall be the maximum construction periods for each service: (1) For stations in the Point-to-Point Microwave Radio and Digital Electronic Message Service, a maximum of 18 months from the date of the license grant; (2) For all other stations licensed under this Part, a maximum of 12 months from the date of the license grant.
> (b) Each license for a radio station for the services included in this part shall also *specify as a condition* therein that upon the completion of construction, each licensee must file with the Commission a certification of completion of construction using FCC Form 494A, certifying that the facilities as authorized have been completed and that the station is now operational and ready to provide service to the public, and will remain operational during the license period, unless the license is submitted for cancellation. *See* 47 C.F.R. § 21.43 (1991); 52 FR 37782 (1987). (Emphasis added).

[6] *See* 47 C.F.R. § 21.902 (b) and (c) (1991). It should not be assumed that Champion was relying on interference analyses filed with its original application when if filed its new application. Champion was neither required to, nor did it, file such analyses with the original application. That application was one of a group of applications submitted on September 9, 1983. For that group of applications, the Commission had waived the interference analysis requirements of Section 22.902(c) of the Commission's Rules, 47 C.F.R. § 22.902(c) (1991). That waiver was no longer in effect when Champion filed its new application on October 7, 1991. *See Video Services Order On Reconsideration* ¶ 7, *citing* 20 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Two Transmitter Sites, 10 FCC Rcd. 11233, 11234-38 (1995).

[7] Section 21.902(g) of the Commission's Rules provided "all interference studies submitted pursuant to paragraph (c) of this section shall be served on all licensees and permittees of, and applicants for the stations considered in such studies. This service shall occur on or before the date of submission and a list of all parties so served shall be submitted with the study." 47 C.F.R. § 21.902(g) (1991).

[8] Champion Petition for Reconsideration, File No. 50123-CM-P-92, (filed April 28, 1995) (1995 Petition).

parties would have involved only "lottery loser" applications that could not be granted under any circumstances.[9] Moreover, Champion argued that it was Commission "policy" to ignore the relevant rules with respect to applications similar to Champion's application.[10]

5. The Division denied Champion's 1995 Petition on September 7, 1999, rejecting Champion's harmless omission argument. The Division demonstrated that Champion's basic premise was wrong: the Commission, in fact, had granted applications Champion characterized as "lottery losers." As explained in the Division's Order, the MMDS lottery procedures required evaluation of the qualifications of the initial winner of a lottery. If the putative winner lacked the necessary qualifications, the next lottery selectee with the requisite qualifications – a "lottery loser" under Champion's analysis – could be awarded a license.[11] Indeed, this occurred with respect to a MMDS station, assigned call sign WMI324, located 0.04 miles from Champion's proposed site. Had Champion conducted an interference analysis with respect to Station WMI324 before it filed its new application – as the Rules clearly required it to do – it would have found its new application was defective and subject to dismissal for failure to provide the requisite adjacent channel protection to Station WMI324.[12]

6. The *Video Services Order on Reconsideration* also rejected Champion's argument about a supposed Commission "policy" that permitted Champion to ignore the interference analysis requirement. The circumstances that Champion relied upon to show that such a policy existed were readily distinguishable from the circumstances surrounding Champion's new application.[13] Finally, as an independent ground for dismissal of Champion's application, the Division cited Champion's failure to serve other affected parties as required by the Rules.[14]

C. Application for Review

7. Champion filed an Application for Review of the *Video Services Order on Reconsideration* on October 7, 1999.[15] Therein, Champion reiterated its argument that Commission staff recommended that Champion file a new application rather than submit a request for extension of time in which to construct its originally authorized facilities.[16] Champion further argued that its application did not require interference analyses in any event because, in its new application, Champion had stated it

[9] *See* 1995 Petition at 3-4, 8-9. Champion asserts that "[t]o require [it] to have treated irredeemable lottery losers in its application would have been a senseless, time-consuming ritual with no conceivable purpose." 1995 Petition at 9.

[10] *See* 1995 Petition at 2, 4.

[11] Section 1.824(a) of the Commission's Rules states that "[i]f the Commission determines that the tentative selectee is qualified, it shall grant the application. In the event that the tentative selectee's application is denied, a second random selection will be conducted." *See* 47 C.F.R. § 1.824(a) (1991).

[12] *See Video Services Order on Reconsideration* ¶ 8 n. 5.

[13] *See Video Services Order on Reconsideration* ¶ 8. In rejecting Champion's argument, the Video Services Division cited McDougald Broadcasting Corp., *Memorandum Opinion and Order*, 12 FCC Rcd 10034, 10035-10036 (1997). In *McDougald*, as in the instant case, the petitioner had filed an application for an MMDS station in 1983, and, having failed to construct, submitted its license for cancellation in 1991. The petitioner then, as here, filed a new application for authority to construct an MMDS station, specifying the same facilities as in the canceled station, and did not provide the required interference analyses. This subsequent application was returned as unacceptable for filing for failure to provide the interference analyses required at the time of filing in 1991.

[14] *See Video Services Order on Reconsideration* ¶ 10; *see also* 47 C.F.R. § 21.902(g) (1991).

[15] Champion Application for Review, File No. 50123-CM-P-92, (filed Oct. 7, 1999). (Application for Review).

[16] *See* Application for Review at 4–6. We note that Champion does not claim or even imply that the staff advised Champion it could file a new application without the interference analyses required by 47 C.F.R. § 21.902(c) (1991).

would provide interference protection to any applicant that might be chosen in the future.[17] Champion also argued that it was being afforded unfair and disparate treatment because applications with defects identical to those in Champion's new application had been granted by the Commission.[18] Champion was silent about its failure to serve affected parties; the defect that the Division found was an independent basis for sustaining dismissal of Champion's new application.[19]

8. The Commission denied Champion's application for review on August 21, 2001.[20] The Commission, in its *MO&O*, again explained the need for an interference analysis when applicants filed for facilities that would conflict with the facilities specified in applications filed in September of 1983. The Commission noted that the legality of its requirement for interference analyses was well settled and had been upheld on appeal.[21] The Commission also found that *McDougald*, cited by the Division in its decision,[22] was precisely on point: the filing of interference analyses was a "basic requirement in determining the acceptability of an application."[23] Further, there was nothing in the Rules or case law suggesting that a mere promise not to interfere with other stations was an acceptable substitute for interference analyses. Moreover, the Commission found that, even if Champion could prevail in its argument that it was not required to submit interference analyses, it still could not overcome the fact – undisputed by Champion – that Champion failed to serve affected parties, thereby depriving them of notice and the opportunity to be heard.[24]

D. Petition for Reconsideration of Denial of the Application for Review

9. In its instant Petition, Champion argues that reconsideration is warranted because the Commission "failed to address certain record evidence"[25] in its disposition of Champion's Application for Review. The evidence Champion refers to relates to (1) the "nature of the technical showing required with respect to 1983 lottery losers whose applications were legally impossible to resurrect;"[26] and (2) Champion's alleged disparate treatment relative to similarly situated applicants.[27] In addition, Champion raises a contention not made in its reconsideration petition. It contends that, because applications not chosen in the lottery were ungrantable, the applicants were not "affected parties" within the meaning of

[17] *See* Application for Review at 7.

[18] *Id.*

[19] *See Video Services Order on Reconsideration* ¶ 10.

[20] Champion Industries, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 16040 (2001) (*MO&O*).

[21] *See MO&O* at 16041 ¶ 5, *citing* Hinton Telephone Company, *Memorandum Opinion and Order on Reconsideration* 10 FCC Rcd 11625, 11638 (1995), *aff'd sub nom. Knollwood, Ltd. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996). As the Commission had previously held, "an applicant filing for a ... cancelled 1983 transmitter site must be required to show that their proposed transmitter site would not cause harmful interference to other previously authorized or proposed stations and otherwise meet the requirements for waiver."

[22] *See MO&O* at 16041 ¶ 5.

[23] *Id*.

[24] *See MO&O* at 16041 ¶ 5, *citing* Edna Cornaggia, *Order on Reconsideration,* 8 FCC Rcd 5442 (MMB Domestic Facilities Division 1993).

[25] *See* Petition at 6 - 8.

[26] *Id.*

[27] *See id.*

that term in Section 21.902(g) the Rules;[28] and, therefore, that Champion was under no obligation to serve them.[29]

III. DISCUSSION

10. As an initial matter, Champion's argument that it was not required to effect service because there were no "affected parties" associated with Champion's new application is factually incorrect. As the Division noted, one of the pending lottery-losing applications that Champion failed to study, Station WMI324, was directly and materially affected by Champion's application. Station WMI324 became a subsequently granted adjacent channel selectee; thus, had Champion's application been granted, Champion's station would have caused adjacent channel interference to Station WMI234.[30]

11. We also disagree that the Commission ignored "record evidence" when it denied Champion's application for review.[31] Indeed, Champion's reconsideration petition deals, not with evidence, but only with its arguments that the Commission found unpersuasive when it denied the application for review. There, the Commission affirmed the "basic requirement" to submit interference analyses, which if ignored rendered an application defective and subject to dismissal.[32] The Commission again cited judicial precedent sustaining its interpretation of the interference analysis rule.[33] Champion's repeated argument that the rule did not apply in its case because the affected applications were ungrantable "lottery losers" is simply without merit.[34] As noted, *supra*, dormant applications that had not been chosen in the lottery could be revived if a lottery winner proved unqualified. Thus, dormant applications were not, as Champion would have it, ungrantable as "a matter of law."[35] Indeed, the Division cited to one such application that was actually granted.[36]

12. In support of its disparate treatment argument, Champion attempts to distinguish the cases cited by the Commission in which applications of other parties, situated similarly to Champion, had been dismissed. Champion avers that those cases are distinguishable because those applicants submitted deficient interference analyses; whereas, in the instant case, Champion filed no interference analyses at all.[37] That is a distinction without a legal difference. The cases cited by the Commission stand for the proposition that, absent a waiver, all MMDS applicants had to submit complete and accurate interference analyses or have their applications dismissed. The Commission need not have said more when it found Champion's "disparate treatment" argument unavailing.

IV. CONCLUSION

13. In sum, there is nothing in Champion's reconsideration petition that would lead us to conclude that the Commission failed to suitably address Champion's arguments in its application for review. Looking only within the four corners of the Commission's *Memorandum Opinion and Order*, it

[28] 47 C.F.R. § 21.902(g) (1991).

[29] *See* Petition at 8. *See also* n. 7 *supra.*

[30] *See Video Services Order on Reconsideration* ¶ 8.

[31] *See* Petition at 1.

[32] *See MO&O* at 16041-42 ¶ 5.

[33] *See* ¶ 8 n. 21 *supra*.

[34] *See* Petition at 6 – 8.

[35] *Id*.

[36] *See* ¶ 5 n. 12 *supra*.

[37] *See* Petition at 8.

is clear that all of Champion's arguments were considered and that, as initially found in the *Video Services Order on Reconsideration*, Champion was wrong in its contention that it did not have to conform to the requirements of Section 21.902(c) of the Commission's Rules concerning interference analyses. It was equally wrong when it argued that it did not have to conform to the requirements of Section 21.902(g) of the Commission's Rules concerning service on other parties.[38] Accordingly, we are denying Champion's petition for reconsideration.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and Section 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.106, the Petition for Reconsideration filed by Champion Industries, Inc. on September 20, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[38] 47 C.F.R. § 21.902(c), (g) (1991).

SEPARATE STATEMENT OF COMMISSIONER COPPS

RE: Champion Industries, Inc. Application for Authority to Construct and Operate a New Multipoint Distribution Service Station on the F-Group Channels at Springfield, Missouri.

This decision troubles me because it appears that strange Commission policy and questionable Commission advice to Champion Industries contributed to that company losing its MMDS license. A quick review of the facts is instructive. Champion won a license through the lottery process in 1983. They were unable to meet their construction deadline and came to the Commission for advice. Commission staff advised them to cancel their license and reapply rather than seeking an extension of time. Champion relied on this advice and did just this in 1991.

The Commission did not act on the application for four years. At that time, despite the advice to reapply, the FCC denied Champion's application. The denial was based on a failure to perform an interference analysis. This analysis had not been required of the 1983 lottery winners, but was required by the time Champion reapplied in 1991. The analysis would have revealed another applicant a mere .4 miles away from Champion. This second applicant had lost the 1983 lottery, but its application remained on file. The second application had been languishing at the Commission for years unaddressed. It would have been denied had it been addressed earlier because of its proximity to Champion. But when Champion cancelled its license and reapplied, the Commission's delay resulted in the lottery loser taking precedence over the licensee.

This tortuous path and unfortunate result is due in large part to Commission policy and advice. It may be unavoidable because of our rules and our policy position that licensees rely on staff advice at their own risk, but it does not please me to vote for it. At a minimum we should use this Order as a call to recognize our mistakes and find a way to make sure that this history is not repeated.